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ENTRENCHING GOOD GOVERNMENT REFORMS

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Those concerned with enumerated powers, the Tenth Amendment, and limited governance have many questions about current trends in U.S. governance: Has the federal government grown too large? Is it doing too much? Has it transgressed lawful limits? Is the federal-state relationship out of balance? Assuming that the federal government has gotten too large, what can you do about it? Or, more generally, what can you do if you think that the federal government is too big, or too small, or is doing the wrong things, or is not doing what it should be doing?

The obvious answer to the two latter questions is that you win elections. The winners decide what good governance is. There are, however, two problems with that answer. First, once you win an election, you can still lose the next one. As a result, you have an interest in figuring out some method to entrench your policy positions reasonably permanently. Second, some of the things you want to do may be precluded by the existing Constitution, though people obviously disagree about what those things are.¹ The obvious remedy to both of these problems is to amend the Constitution. So to entrench your policy victories, you need to win elections first, and then you might also have to amend the Constitution.

I am actually in favor of amending the Constitution in a variety of ways. People disagree about what ought to be amended, but those differences get worked out through the amendment process. The problem with the amendment route is that politicians actually have very few incentives to seriously pursue amending the Constitution, even if they have won an election. The reason for that is two-fold, depending on the type of amendment.

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1. *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1, 124 Stat. 119 (2010); Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003).

The first kind of amendment is substantive. This is the type of amendment that could, for example, restrict the scope of the national government, preventing it from doing certain kinds of things. The second type of amendment is procedural, something like the amendment to let a state override national legislation. Both types of amendments present their own problems. With respect to the substantive amendments, the problem is this: A politician presumably wants to make a substantive amendment in order to enact substantive legislation. But if that politician has the votes in Congress to submit amendments to the states, then he also has the votes necessary to enact the substantive change through ordinary legislation.² Politicians have limited time and political capital, which means that they are more likely to use this more straightforward method of attaining their substantive goal. Then, maybe if there is time left over, a politician might make some effort to get an amendment that would be submitted to the states. This submission poses additional incentive problems for politicians, which I will address later in this Essay. This route historically has been used to pursue amendments.³

In addition to a congressional vote, there is another route to amending the Constitution. This second method is to convene a constitutional convention upon the call of the states.⁴ Using this method makes sense only if the substantive change lacks the support necessary to pass in Congress, and there is sufficient control over state legislatures to get the right kind of call for a convention. In other words, it makes sense for a politician to use this method if he does not have two thirds of the votes in both the House and Senate, but his party does control two thirds of the state legislatures, and he thinks there is a decent chance that, within the foreseeable future, he will get control of three quarters of them. Another

2. For Congress to propose a constitutional amendment to the state legislatures for ratification a two-thirds vote in both houses of Congress is required. U.S. CONST. art. V.

3. *The Constitutional Amendment Process*, U.S. NAT'L ARCHIVES, <http://www.archives.gov/federal-register/constitution/> (last visited Apr. 11, 2011) ("None of the 27 amendments to the Constitution have been proposed by constitutional convention.").

4. U.S. CONST. art. V; see also James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005 (2007).

political obstacle is the myriad of procedural issues about how one goes about convening a convention and what the convention would have the power to do once in session.⁵ No matter what the correct resolution of those questions, the uncertainty about them will allow opponents of the amendment to raise fears of a “runaway” convention and the like. Those fears might end up blocking a politician’s ability to sustain his two-thirds margin in the state legislatures for long enough to get the convention going. Given these difficulties of getting a substantive amendment to the Constitution, a politician sensibly would focus his attention on getting the substantive legislation enacted and then trying to figure out some way to defend that legislation politically by generating constituencies of support for the established policy position. Think here of Medicare and the constituency of support that was created by its enactment, a constituency of support to whom both Democrats and Republicans appeal in presenting various reform proposals.⁶

The second kind of amendment is a procedural amendment. Here, the difficulty, again from a politician’s point of view, is straightforward. There are two parts to this difficulty. The first is that the payoffs are in the future. That is, if there is a state veto or override mechanism, or any other procedural mechanism, the politician is not going to get anything out of it. What he possibly will be buying is that, in the future, if the composition of Congress changes and he starts losing policy positions, he might—but only might—get a payoff in a state override of the policies that have been adopted. Again, he can adapt this to fit the particular procedural mechanism. But the major point is that the payoffs are in the future, and the payoffs are uncertain even if a politician has the requisite votes in the Congress. First, there is no guarantee that if he submits an amendment to the states, it is going to be adopted. Second, there is uncertainty about the actual deployment of the mechanism with respect to whatever it is that concerns the politician.

5. See, e.g., Ralph M. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV. 921 (1968). Such disadvantages include the potential inability to constrain the scope of the convention, the impact of strong political parties, and the obstacle of constant publicity. *Id.* at 922–27.

6. See, e.g., Jonathan Oberlander, *Through the Looking Glass: The Politics of the Medicare Prescription Drug, Improvement, and Modernization Act*, 32 J. HEALTH POL. POL’Y & L. 187 (2007).

The possibility of entrenching good government reforms—again, from whatever point of view one takes about what is good government reform—by the constitutional amendment process is quite small. It is not zero. The reason it is not zero is that sometimes legislation cannot fix policies that yield negative practical consequences. The best example here is the universal extension of the right to vote to people over the age of eighteen. The Supreme Court said that Congress could pass a statute extending that right to vote to federal elections but could not extend that same right in state elections.⁷ This decision created an administrative nightmare for the states. Within nine months,⁸ a constitutional amendment to require the vote for eighteen year olds at the state level was adopted not because people at the state level were convinced that it was a good policy position, though some of them were, but mostly because of the administrative concerns related to setting up two systems of voting.⁹ Therefore, there are some possibilities for the amendment process, but they are relatively rare.¹⁰

Despite these considerations, politicians regularly propose amendments.¹¹ This is best explained by what political scientists have called “advertising.”¹² Politicians basically propose an amendment so that they can send out a press release, not so the Constitution actually will be amended. Often, when a

7. *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970).

8. *Oregon v. Mitchell* was decided on December 21, 1970; the Twenty-Sixth Amendment received its thirty-eighth ratification on July 1, 1971. See STAFF OF S. SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY 90 (1985).

9. Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 AM. U. L. REV. 1487, 1523 (2005) (“The Twenty-Sixth Amendment granting the right to all citizens eighteen years of age and older to vote in all elections was proposed to remedy the anticipated confusion, fraud, and costly administration of such a dual system.”).

10. Only four constitutional amendments have been adopted to overrule Supreme Court decisions. See *id.* at 1518–19.

11. Members of Congress have proposed more than 10,000 amendments since 1971. Peter Grief, *A Constitutional Amendment for Every Occasion? Congress Seems To Think So*, CHRISTIAN SCI. MONITOR (Aug. 24, 2010), <http://www.csmonitor.com/USA/Politics/DC-Decoder/2010/0824/A-constitutional-amendment-for-every-occasion-Congress-seems-to-think-so>.

12. See DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 49–77 (1974) (distinguishing three types of legislative activity: advertising, credit claiming, and position taking).

member of Congress or a state governor supports a constitutional amendment, it is not actually a serious policy proposal from the politician's point of view. The politician may agree with the amendment on its merits, but he sees it as a way of getting some press about the position that he is taking, maybe to get more support for enacting the policy as a statute.

There is another take on the question of constitutional amendments. Given that amendments limit politicians' power, it is no surprise that politicians rarely push hard for constitutional amendments. The normative argument for amending the Constitution in the face of this difficulty is perfectly coherent, but it faces some difficulties when presented as an argument that the people should have the power to control their agents, that is, as an argument from democracy. The assumption that underlies the argument in favor of amending the Constitution is, roughly speaking, that the providential hand has happened to come down again, but might be lifted in a few years.¹³ So the people now happen to want to limit government, and politicians should seize the opportunity so that when the people's views change in the future they will not be able to implement their then-current views.¹⁴

It is very hard to defend amending the Constitution on the ground that we want to keep the people who ten years from now might have a different view from implementing it. I am fine with constitutions, but the democratic defense of amending the Constitution to preclude democratic decisionmaking in the future is puzzling. To conclude on the question of what one can do about it: From a constitutional scholar's point of view, I am not interested in the question of winning or losing elections. As a citizen I am, but as a scholar I am not. What I am interested in is thinking about how the constitutional amendment process might be used to entrench policy positions of whatever sort, and although I would like to see more amendments to our Constitution, I am very skeptical about whether they will occur.

13. See, e.g., Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 123 (1993) ("[P]recommitment through a constitution allows a supermajority to put certain actions beyond the power of government and, thus, beyond the reach of any subsequent majority coalitions.").

14. See *id.*